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Procedure -- Construction of Florida Statute Relating to Depositions as Including Written Interrogatories

abuse are rare, there is generally no right of appeal.[13] Since the order can be vacated or modified by the trial court at any time before entry of a final decree in the main action, an immediate appeal is refused,[14] but a few jurisdictions allow an appeal from this interlocutory decree as an incident to the appeal from the final decree;[15] or by other prescribed procedures.[16]

The Pennsylvania courts are unique in their treatment of the order for temporary alimony. Where a motion for alimony pendente lite has been granted, an appeal is allowed,[17] but where such motion has been denied, an appeal is not allowed.[18] No clear reason is given by the courts for this distinction.[19]

Allowing an appeal in this situation may cause the wife to suffer hardships by the stay of the order pending the outcome of the appeal. On the other hand if no appeal is allowed, the wife is helpless until the final decree is entered; and with respect to the husband, he may be forced to pay an unjustifiably large amount in the interim before the final decree. The most equitable procedure is to allow an appeal in all instances, and to allow the wife temporary alimony pending an appeal by the husband from a decree allowing alimony pendente lite.[20] In this way, the loss, if there be a loss, is negligible, and it is placed, for the most part, on the party who can better afford it.

PROCEDURE—CONSTRUCTION OF FLORIDA STATUTE RELATING TO DEPOSITIONS AS INCLUDING WRITTEN INTERROGATORIES

After the declaration had been amended, defendants served written interrogatories on the plaintiff. Plaintiff filed objections, alleging that the Florida deposition statute[1] contemplates the taking of oral depositions only and does

13. Kapp v. Kapp, *supra;* Abrams v. Rosenthal, 153 La. 459, 96 So. 32 (1923); *accord*, Colby v. Colby, *supra;* Call v. Call, 65 Me. 407 (1876) (no exceptions allowed from trial court's discretion).

14. Kapp v. Kapp, *supra;* Earls v. Earls, 26 Kan. 178 (1881); Randall v. Randall, 156 Miss. 656, 126 So. 484 (1930). *Contra:* Carroll v. Carroll, 48 La. Ann. 835, 19 So. 872 (1896); Gordon v. Gordon, 91 S. C. 245, 74 S. E. 360 (1912).

15. Hay v. Hay, 40 Idaho 159, 232 Pac. 895 (1924); Boerio v. Boerio, 134 Pa. Super. 501, 4 A.2d 614 (1939); Keester v. Keester, *supra.*

16. Mancil v. Mancil, 240 Ala. 404, 199 So. 810 (1941) (mandamus is the appropriate remedy); *Ex parte Apperson*, 235 Ala. 266, 178 So. 37 (1937); Clark v. Clark, 155 Fla. 574, 20 So.2d 900 (1945) (writ of certiorari); Grimes v. Posecai, 175 La. 1, 142 So. 703 (1932) (mandamus).

17. Rutherford v. Rutherford, 152 Pa. Super. 517, 32 A.2d 921 (1943).

18. Boerio v. Boerio, *supra.*

19. White v. White, 86 Cal. 212, 24 Pac. 1030 (1890) (with respect to the right of appeal, no distinction between an order denying and an order allowing alimony pendente lite); *accord*, Wallace v. Wallace, 189 Ky. 451, 225 S. W. 31 (1920).

20. People *ex rel.* Earle v. Circuit Court, 169 Ill. 201, 48 N. E. 717 (1897).

1. FLA. STAT. § 91.30 (1947). This act says *inter alia*, "Depositions in Chancery and Civil cases . . . are permitted to be taken . . . pursuant to the Federal Rules of Civil Procedure."

not allow written interrogatories to be served on the adverse party. The trial court forwarded this issue, by certification, to the supreme court. *Held;* that the statute contemplates depositions either orally or by written interrogatories, and includes within its scope Rule 33 of the Federal Rules of Civil Procedure.[2] *Malcolm v. Stark,* 38 So.2d 469 (Fla. 1949).

Written interrogatories and depositions, though not inconsistent, are entirely different tools [3] which are used to obtain disclosure of certain facts not yet known to a party. The interpretation of the word *interrogatory* has for more than one hundred years been of a controversial nature. In 1816 it was said that while in common-law courts the word had no fixed, certain or invariable meaning, in chancery it had two concepts, a technical and an ordinary one.[4] While the technical meaning is limited to a written question propounded by one party and served on the adversary,[5] the ordinary meaning is not limited and includes any question.[6] The development of the *deposition,* defined as the written testimony of a witness given in advance of a trial or hearing upon oral or written examination,[7] is of much more recent nature.[8]

There are certain well-recognized basic distinctions between the written interrogatory and the deposition.[9] While depositions may be used to obtain testimony from any witnesses,[10] interrogatories are permissible only to obtain facts from the adverse party.[11] Depositions may be secured orally or in writing,[12] but interrogatories can be obtained only by written means.[13]

The Florida statute in question adopted those Federal Rules of Civil Procedure which are applicable.[14] Prior to this case the legislative intent had been interpreted to have adopted only the Federal Rules from 26-32 inclusive, and to exclude Rule 33.[15] In Rules 27-30 the word deposition is alone used, while Rule 33 contains only the term interrogatory in its technical sense. The only places where the words are used together are in Rules 26a and 31. Here,

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2. Rule 33 prescribes the procedure of serving written interrogatories on the adverse party.
3. *See* Bailey v. New England Mut. Life Ins. Co., 1 F. R. D. 484, 495 (D. C. Cal. 1940); Comments, 33 VA. L. REV. 125 (1947), 28 VA. L. REV. 348 (1941).
4. *See* State v. Ludlow, 5 N. J. L. 905, 906, 2 Southerland 772, 773 (Sup. Ct. 1816).
5. Neske v. Burns, 8 N. J. Misc. 160, 149 Atl. 761 (Sup. Ct. 1930).
6. See note 4 *supra.*
7. *See* State v. Dayton, 23 N. J. L. 49, 54 (Sup. Ct. 1850).
8. Sunderland, *Scope and Method of Discovery Before Trial,* 42 YALE L. J. 863, 874 (1932).
9. Mehrtens, *Depositions and Discovery in Florida under the Federal Rules,* 1 U. OF FLA. L. REV. 149, 150 (1948); Holtzoff, *Instruments of Discovery under the Federal Rules of Civil Procedure,* 41 MICH. L. REV. 205 (1942); Comments, 33 VA. L. REV. 125 (1947), 28 VA. L. REV. 348, 354 (1941).
10. Fed. R. Civ. P., 26; *See* Hoffman v. Chesapeake & O. Ry., 7 F. R. D. 574, 577 (D. C. Ohio 1947).
11. Fed. R. Civ. P., 33; *see* Hickman v. Taylor, 329 U. S. 495, 504 (1947).
12. *See* United States v. United States Cartridge Co., 6 F. R. D. 352, 353 (D. C. Mo. 1946).
13. Mehrtens, *supra* note 6, at 193; Holtzoff, *supra* note 6, at 213.
14. See note 1 *supra* (the exact rules are not mentioned).
15. Mehrtens, *supra* note 6, at 150, 151.

however, interrogatory is used as a means of securing a deposition and not in its technical sense as a method of securing information from an adverse party. Because of the distinctions mentioned, there seems sufficient authority to state that written interrogatories under Rule 33 are different from depositions.[16] Since the title and contents of the Florida statute in no way refer to the interrogatories of Rule 33, the intent of the legislature could not have been to broaden the scope of the deposition procedure to include technical interrogatories.

SALES—IMPLIED WARRANTY OF FITNESS IN SALE OF FOOD BY RESTAURANT

Defendant, the proprietor of a hotel and dining room, served unwholesome food to the plaintiff, a paying guest, as a result of which plaintiff became ill. Plaintiff sued for damages resulting from his illness on the theory of an implied warranty that the food was fit for human consumption. A demurrer to the declaration was sustained with leave for plaintiff to plead over. Plaintiff refused to amend his declaration and appealed from the final judgment rendered against him. *Held*, that the declaration states a good cause of action since there is an implied warranty of fitness for human consumption when a victualer sells food to a guest. Reversed and remanded for further proceedings. *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (Fla. 1949).

The instant case is one of first impression in Florida. Many jurisdictions in dealing with prepared food cases have applied the negligence doctrine in preference to the implied warranty doctrine.[1] The negligence doctrine is based on the theory that a restaurant keeper renders a service rather than makes a sale;[2] and, therefore, the patron must prove negligence on the part of the victualer in order to recover.[3] This puts the patron at a great disadvantage, unless he can invoke the doctrine of *res ipsa loquitur*,[4] as a patron has no opportunity to examine the food before it is prepared.[5] The court in the principal case pointed out that economic conditions have changed and now instead of being served "boarding house style," or fixed menu, the patron has a chance to select his victuals which is indicative of a sale rather than a service.[6] In

16. See note 9 *supra*.

1. *E.g.*, Goodwin v. Country Club of Peoria, 323 Ill. App. 1, 54 N. E.2d 612 (1944); Stewart v. Martin, 353 Mo. 1, 181 S. W.2d 657 (1944).
2. Nisky v. Childs, 103 N. J. L. 464, 135 Atl. 805 (Ct. Err. & App. 1927); Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914).
3. Lynch v. Hotel Bond Co., 117 Conn. 128, 167 Atl. 99 (1933).
4. Starke Coca-Cola Bottling Co., v. Carlington, 159 Fla. 718, 32 So.2d 583 (1947).
5. Barrington v. Hotel Astor, 184 App. Div. 317, 171 N.Y. Supp. 840 (1st Dep't 1918) (The entire control of the supplies which enter into the dish, as well as its method of preparation and progress to the table from the kitchen are entirely within the restaurant keeper's control).
6. *Accord*, West v. Katsafanas, 107 Pa. Super. 118, 162 Atl. 685 (1932).